No. 97-341

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

JOYCE I. OLDFATHER, Individually and As Representative of a Bondholder Class; and Edwin Bertrand, Individually and As a Representative of a Bondholder Class,

Petitioners,

vs.

CIGNA INSURANCE COMPANY, f/k/a INA Underwriters Insurance Company,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Court deny the instant Petition where the Ninth Circuit's opinion turned entirely on Arizona state insurance law, there are no constitutional or federal issues presented (let alone a split of authority on such issues), Petitioners inappropriately seek this Court's review of the Ninth Circuit's fact-bound and evidentiary findings, and Petitioners misstate the facts, the law and the fundamental basis of the Ninth Circuit's opinion?

2. Did the Ninth Circuit correctly apply well-established Arizona law in ruling that there was no coverage under Respondent's professional liability policy, since the insured, Guren, Merritt, Fiebel, Sogg & Cohen ("Guren Merritt") did not commit any liability-producing conduct?

3. Did the Ninth Circuit correctly hold that liability in the underlying class actions was limited to what Robert Blattner did on the bond projects at a much later time and while at a completely different law firm, Benesch, Friedlander, Coplan & Aronoff ("Benesch"), which Respondent did not insure?

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STATEMENT OF THE CASE

This appeal concerns the Ninth Circuit's correct interpretation and application of well-established Arizona law that Respondent's professional liability insurance policy, which insured a law firm (Guren Merritt), did not provide coverage for two underlying securities' class actions commenced by Petitioners, where: that law firm was not named by Petitioners as a defendant in the underlying actions; it had not committed any liability-producing acts, errors, or omissions; it had ceased to have any involvement with the underlying transactions and issuance of bonds long before any liability-producing act, error or omission was committed by a different law firm (Benesch); and the liability-producing acts, errors and omissions were committed solely by Benesch.

As such, the instant Petition is particularly inappropriate for review by this Court for at least the following reasons:

First, this appeal turns entirely on the Ninth Circuit's correct interpretation and application of Arizona state insurance law. There is no need for this Court to determine and then review what is applicable Arizona state insurance law, and whether the Ninth Circuit correctly applied Arizona law, especially when that court has expertise and experience with Arizona insurance law. Moreover, to the extent Petitioners seek to have this Court resolve purportedly "novel" questions of Arizona insurance law, a proposition with which Respondent disagrees, Petitioners should have commenced their coverage action in state court and not in federal court. Or else, they should have sought to have certified questions of law resolved by the Arizona State Supreme Court (not this Court). Petitioners never made such a request before

the District Court. Petitioners' certification request came only *after* the Ninth Circuit rendered its opinion, and was appropriately denied by the Ninth Circuit for obvious reasons.

Second, Petitioners provide no "compelling reasons" requiring this Court's review. There are no constitutional or federal questions at issue, and Petitioners did not contend otherwise. There are no conflicts between any federal courts of appeal (or with any state supreme courts) with respect to Petitioners' state insurance law claims, and Petitioners do not contend otherwise. Indeed, this case *only* involves whether there is insurance coverage under a specific professional liability insurance policy (issued 13 years ago), under a particular set of facts and allegations which were extensively litigated before the District Court and the Ninth Circuit.

Third, the standard reasons employed by this Court in denying *certiorari* petitions apply with equal if not greater force here. The alleged errors asserted by Petitioners turn on factual and evidentiary findings that were entirely correct and appropriate, and certainly do not require this Court's valuable time and resources to re-review those factual and evidentiary submissions and rulings by the District Court and the Ninth Circuit. In addition, and perhaps in their zeal to seek review by this Court, Petitioners have misstated the legal basis for the Ninth Circuit's ruling.

Fourth, Petitioners *have* already recovered all available insurance coverage from the insurers of Benesch, and all Petitioners are seeking now is insurance provided to a different law firm (Guren Merritt) that was never named a defendant in the underlying class actions, committed no liability-producing conduct resulting in Petitioners'

alleged injury, ceased to be involved long before the key events and transactions, and was never involved in the underlying settlement *in any respect*. It is especially revealing that Petitioners state that this appeal is important to not only them, but "society at large", when in fact, the *real* beneficiary is not the underlying plaintiff classes, but the excess insurer of Benesch (Old Republic), which has financed this coverage suit, used its own lawyers to litigate this case and pursue appeals, and hopes to recover 50% of the potential $23 million sought from Respondent.

FACTS

The Underlying Chandler Manor And Sun Mesa Bond Transactions

The underlying transactions forming the basis of this insurance litigation involve tax exempt bonds issued for the construction and operation of two residential retirement communities in Mesa and Chandler, Arizona, known as the "Sun Mesa" and "Chandler Manor" projects. Guren Merritt and one of its partners, Robert Blattner, was initial co-bond counsel, but ceased to be co-bond counsel in *mid-March 1984*. At that time, Blattner left Guren Merritt to become a member of Benesch, at which time Benesch became co-bond counsel.

Prior to when Blattner left Guren Merritt in mid-March 1984, Blattner committed no liability-producing act, error or omission, but only engaged in certain preliminary activities. In stark contrast, however, much later in 1984, the Benesch firm and Blattner did commit liability-producing acts, errors and omissions, which led to them being sued in two class actions.

A. Blattner's Preliminary Acts At Guren Merritt

While at Guren Merritt, Blattner performed certain preliminary activities relating to the bond projects:

- An initial application for each bond project was submitted to the Mesa and Chandler Industrial Development Authority ("IDA"). (CR 181, p. 15; CR 211, p. 13)[1] Each IDA approved the preliminary application, contingent on more information being submitted later. Each IDA approved the applications shortly before the bond projects closed, which was after Blattner had left Guren Merritt and was at Benesch. (ER 8, p. 11; ER 14, p. 5; ER 19, pp. 6-7) At no time was any IDA approval withdrawn, and neither IDA asserted any claim against Guren Merritt or Blattner.
- An application seeking tax exemption was submitted to the IRS. (CR 181, Exs. 45-46) After Blattner left Guren Merritt and was at Benesch, the IRS approved those applications. (CR 211, Ex. A; ER 19) However, at no time did the IRS revoke its approval, or make any claims against Guren Merritt or Blattner.
- An issue of whether the projects required "life care" permits under Arizona law had surfaced before Blattner left Guren Merritt. (CR 296, Ex. 4) However, that issue was not resolved, one way or the other, while Blattner was at Guren Merritt. (CR 211, p. 13; CR 211, Ex. Q, BB, and CC; ER 2)

B. Blattner's Liability-Producing Conduct At Benesch Friedlander

In mid-March 1984, Blattner left Guren Merritt and became a partner at Benesch. At that time, Guren Merritt ceased to be co-bond counsel, and Benesch became co-

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[1] Respondent's citations to "CR" refer to docket number entries in the Clerk's Record; citations to "ER" are to the Excerpts of Record submitted to the Ninth Circuit.

bond counsel. (CR 1, pp. 3-4; CR 211, p. 13; CR 211 Ex. A, pp. 6-7; ER 19) At least the following liability-producing activities occurred while Blattner was at Benesch:

- Preliminary official statements or red herrings were distributed, in which Benesch (not Guren Merritt) was identified as co-bond counsel. (CR 296, Ex. 4, ER 2)
- Blattner prepared, signed and delivered opinion letters on Benesch letterhead (not Guren Merritt) attesting to the validity and tax exempt status of the bonds. (ER 4, 6) Copies of those bond opinions were provided to potential bond purchasers, who allegedly relied on them. (ER 14, p. 9; ER 8, p. 7)
- The prospectus-like documents for each bond project, known as Official Statements ("OSs"), were reviewed and approved by Blattner on behalf of Benesch (not Guren Merritt), and were then distributed to potential bond purchasers. (ER 3, 5, 19) Ultimately, the OSs were allegedly relied upon by the bond purchasers. Benesch (not Guren Merritt) appeared as co-bond counsel in the OSs. (*Id.*)
- On August 30, and November 30, 1984 respectively, the bond projects for Chandler and Sun Mesa closed, after which the bonds were sold. Blattner attended each closing on behalf of Benesch. (ER 14, p. 5; ER 8, ER 19, p. 3, 6-8)[2]

The Underlying Securities Class Action Litigation

A. The Class Action Complaints

The Sun Mesa and Chandler Manor projects eventually failed. In 1986 and 1987, the Sun Mesa bonds and the Chandler Manor bonds were declared in default. (CR 1,

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[2] Respondent attaches as an Appendix a chart summarizing the above undisputed facts, which compares Blattner's work on the projects while at Guren Merritt and Benesch.

pp. 5-7; ER 23) Thereafter, two separate class actions were brought on behalf of purchasers of the Sun Mesa and Chandler bonds, *Joyce I. Oldfather v. Sun Mesa Corporation, et al.* and *Bertrand v. Industrial Development Authority of City of Chandler.* (ER 8, 14) The plaintiff-classes consisted solely of those persons who had purchased bonds, complaining that they were materially misled by the OSs provided to them prior to their bond purchases. In each action, defendants were professionals and other entities involved in the preparation and dissemination of the OSs, erroneous legal opinions, and sale of the bonds to the bond purchasers. (ER 7)

Both class action complaints named *Benesch* as a defendant because of its role as co-bond counsel, pointing to work of Blattner on the projects as a member of *Benesch*. Both complaints named, as individual defendants, those Benesch partners as of the date the bonds were issued. (ER 14, p. 9-10; ER 8, p. 7-8)[3]

In contrast, the *Oldfather* and *Bertrand* complaints did *not* name Guren Merritt or any former Guren Merritt partner as a defendant.[4] Nor did the complaints specifically allege that Blattner committed any wrongful conduct at Guren Merritt. Rather, the gravamen of both

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[3] Both complaints made clear they were naming these Benesch partners as defendants "solely to permit enforcement of a judgment against their personal assets in the event that [Benesch] assets [were] insufficient to satisfy the judgement to be obtained by plaintiffs." (ER 14, p. 10; ER 8, p. 8)

[4] Not surprisingly, in response to complaints filed in *Bertrand* and *Oldfather*, answers were only made on behalf of the Benesch firm and the partners thereof who had been specifically named as defendants (ER 16); no answer was ever served or filed on behalf of Guren Merritt or any former partner of Guren Merritt. Nor did Benesch or any of its partners assert any claim against Guren Merritt or any former partners of Guren Merritt.

class action complaints was that the bond purchasers had been misled by material omissions in offering documents disseminated when the bonds were sold. With respect to Benesch, the complaints alleged:

> In connection with *disclosures to investors and the sale of the bonds*, all counsel involved in the transaction issued misleading legal opinions concerning their involvement in the preparation and review of necessary documents, the Chandler Commons project, and applicable law. The defendant law firms that *rendered opinions* that there were no material representations or non-disclosures as summarized above and below, *issued misleading legal opinions . . . Benesch Friedlander*, acting principally through its partner, defendant Robert A. Blattner, *delivered an opinion at the closing* that the bonds were valid and legally binding special obligations of the issuer and that the bonds were tax exempt. Benesch Friedlander participated in disclosures to investors and participated in the preparation and use of the prospectus. (ER 14, p. 9, 19; ER 7) (Emphasis added)[5]

In *Bertrand*, the class of bondholders sought damages predicated on their having purchased now worthless bonds. The exact same is true for the damages sought in *Oldfather*. No damages were sought in either action for any wrongful conduct happening before they had purchased the bonds.

B. The Pre-Trial Order

After all document and deposition discovery in the underlying *Oldfather* action was complete, on February

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[5] The allegations in the *Oldfather* complaint were identical in all material aspects to the *Bertrand* allegations.

20, 1991, the parties submitted a joint pre-trial order ("PTO"). (CR 211, Ex. 1, ER 19) In the PTO, Petitioners identified as defendants "Benesch and all of its partners as of November 30, 1984 including Robert A. Blattner." (*Id.* at 2) Petitioners asserted that *Benesch's* conduct was an "extreme departure" from *Benesch's* duty of ordinary care:

> *Benesch/Friedlander participated in making disclosures to plaintiffs. Through Blattner, they drafted, reviewed and approved the Sun Mesa Official Statement, which was distributed to purchasers of the Bonds, including plaintiffs* . . . [Benesch] knew and intended that the Bonds would be sold, that the Sun Mesa Official Statement was to be used in selling the bonds, that it would be distributed to the investing public, including plaintiffs, and that the investing public could and would rely on the Official Statement . . . *[Benesch] represented that the Sun Mesa Official Statement contained a fair, complete, and accurate depiction of the Sun Mesa project* . . . In preparing the Sun Mesa Official Statement, [Benesch] knew or recklessly ignored the facts that a life care permit was required . . . (*Id.* at 24-25)

Moreover, Petitioners asserted how they allegedly relied upon and were harmed by *Benesch's* conduct:

> [Benesch] prepared a fraudulent Official Statement. Plaintiffs would not have purchased the bonds but for the fraudulent admissions from the Sun Mesa Official Statement. [Benesch's] conduct proximately caused plaintiff's damages in an amount equal to the purchase price of the bonds, pre-judgment interest, attorney's fees and costs incurred . . . (*Id.* at 37)

Significantly, the *only* reference to Guren Merritt in the PTO was that Blattner (and an associate) had left Guren Merritt on March 19, 1984. (*Id.* at 6) The PTO contained

no other allegation concerning Guren Merritt, let alone one of wrongdoing.

C. The Underlying Settlement

On or about March 20, 1991, Petitioners entered a settlement agreement with Benesch, and all Benesch partners as of the dates when the bonds had been issued. (CR 181, Ex. 26, ER 20) Petitioners agreed to, among other things, settle all of their claims against Benesch and its partners, not execute on the stipulated judgments entered against Benesch or its partners, and only seek to recover the net amounts of the judgments from defendant.[6] (CR 296, Ex. 16, ER 21)

Benesch and its partners, including Blattner, assigned their rights under the Guren Merritt policy to Petitioners. (CR 296, Ex. 16, ER 21) Thereafter, all settlement-related documents referred only to "Benesch and all of its partners as of the date of issuance of the bonds, including Blattner." (CR 259, Ex. 28, ER 21-22) There were no settlement-related documents relating to Guren Merritt or its former partners.

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[6] As part of the March 20, 1991 settlement, the settling parties and Old Republic gave Respondent 5 days to contribute its $5 million limits, otherwise the settlement would be executed without Respondent and Respondent would be sued for coverage for $23 million and bad faith. (CR 181, Ex. 26, p. 6-7) However, the settlement agreement already had provided that, whether Respondent agreed to pay or not, Blattner was *not* exposed to any liability. If Respondent did *not* pay, Petitioners and Old Republic would try to hold *Respondent* liable. Knowing that Blattner would *not* be exposed to any personal liability, Respondent adhered to its no coverage position. (CR 181, Ex. 27) Through this intended "set up," Petitioners and Old Republic sought a potential $23 million windfall from Respondent.

The Insurance Policies

A. The Benesch Policies

Benesch was insured under a $5 million professional liability claims-made policy issued by Pacific Employers Insurance Company ("PEIC"), an affiliate of Respondent, effective January 19, 1987 to January 19, 1988. (CR 181, Ex. 4) Only Benesch and its partners were insured under the PEIC policy, and only for acts, errors or omissions committed at Benesch.[7]

B. The Guren Merritt Policy

Respondent insured Guren Merritt under a policy affording professional liability coverage from November 30, 1983 to November 30, 1984. For purposes of this case, the applicable limits of liability are $5 million. The insuring agreement provides in relevant part:

> To pay on behalf of the Insured[8] all sums which the Insured shall become legally obligated to pay as damages as a result of claims first made against the Insured or any person for whose acts *the insured is legally liable*:

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[7] Old Republic issued an excess policy that followed form to the PEIC policy, insuring Benesch and its partners for claims made between January 19, 1987 and January 19, 1988. (CR 54, Ex. B) Old Republic took the position that all underlying coverage, including the *Guren Merritt* policy, had to be exhausted before its excess policy provided any coverage to Blattner. (CR 316, Ex. G)

[8] The policy expressly required that the professional services had to be rendered by "the Insured," which was defined as: "any *former* partner . . . acting in his professional capacity on behalf of [Guren Merritt]." (*Id.*)

> (a) *By reason of any act, error or omission* in professional services rendered or which should have been rendered by the insured. . . . (ER 1) (Emphasis added)

As initially issued, the policy required that, in order for there to be coverage, the claim had to be "first made" during the policy period. (*Id.*) However, Endorsement 7 amended the policy to eliminate the requirement that the claim had to be first made during the policy period. Endorsement 7 provided in relevant part:

> (1) Coverage will be provided *according to the applicable terms, conditions and exclusions of this* policy for all the claims first made after the termination of the policy period, arising out of any act, error, or omission in rendering professional services for others in the insured's capacity as a lawyer, which took place prior to the end of the policy period and were caused by the insured or any other person for whose acts, errors, or omissions the insured is legally responsible, and are otherwise covered by the policy. . . (*Id.*) (Emphasis added)

The sole purpose and effect of Endorsement 7 was to eliminate the requirement that a claim first be made during the policy, which was obtained by Guren Merritt when it dissolved in June 1984.

C. The Claims For Coverage

1. Under The PEIC Policy

Immediately after institution of the underlying class actions, Benesch and its partners, including Blattner, demanded that PEIC defend and indemnify them under the PEIC policy. (CR 181, Ex. 5) Without disputing coverage, PEIC acknowledged its obligation to defend and appointed a leading Phoenix firm (Jennings, Strouss & Selman) to defend. (CR 181, Ex. 6) Much later, when the

actions were being settled, PEIC paid its $5 million limits of liability.

2. Under The Respondent's Policy

For two years after the underlying class actions were commenced, no one ever gave notice or made any demand for coverage under Respondent's Guren Merritt policy. During that time, Benesch and its partners, including Blattner, were defended by Jennings Strouss (under the PEIC policy).

However, in May 1988 Benesch submitted a claim for coverage to Respondent, contending that Respondent's Guren Merritt policy provided coverage for the same claims asserted against Benesch and its partners. (ER 9, 10) After considering the request, analyzing the terms of its policy, and investigating relevant facts, Respondent declined coverage under the Guren Merritt policy. (ER 11, 15, 18) Simply put, there was no coverage *under the Respondent's policy* because Blattner had not committed any liability-producing act, error or omission while at Guren Merritt; rather, his liability in the two class actions stemmed from what he did while at Benesch.

The District Court's Erroneous Coverage Order

On May 17, 1993, Petitioners moved for partial summary judgment contending that the Guren Merritt policy provided coverage for the $23 million settlement of the claims against Blattner. (CR 177, 180-181, 221-223) Petitioners claimed that Blattner had committed acts, errors or omissions while at Guren Merritt, contending it was irrelevant whether any such act, error or omission resulted in liability against Blattner. (*Id.*) On or about August 20, 1993, Respondent opposed Petitioners' summary judgment motion and moved for summary judgment on all counts in Petitioners' complaint. (CR 211-215,

227-228, 233) Respondent asserted that the Guren Merritt policy did not afford coverage because Blattner had not committed any liability-producing act, error and omission at Guren Merritt. (*Id.*)

On June 24, 1994, without a hearing, the Honorable Carl A. Muecke of the United States District Court of Arizona issued an order granting Petitioners' motion and denying Respondent's motion. (ER 27; Petitioner's Appendix ("Pet. App.") 6-46)[9] In its coverage analysis, the District Court interpreted the phrase "act, error, omission" according to its "ordinary meaning and effect", finding that Blattner had merely committed "acts" while at Guren Merritt. (*Id.* at 29-30)

However, after making these findings, the District Court did *not* analyze whether Blattner's alleged liability in the underlying class actions was "by reason of" or "arose out of" such conduct. Rather, the District Court held that there was *no* requirement that the alleged acts or omissions must result in liability. (*Id.* at 36-37)

By order dated November 28, 1995, the District Court (Hon. Roslyn O. Silver, the current presiding judge) reversed a prior order denying 28 U.S.C. § 1292(b) certification, and allowing Respondent an immediate interlocutory appeal of the District Court's prior coverage ruling. (ER 28)[10]

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[9] In rendering 21 pages of detailed findings, the District Court reviewed, weighed and evaluated conflicting evidence presented by each side. In several instances, the District Court expressly noted that it had done so. (*See* June 24, 1994 order at pp. 5 n.2, 7, 8, 9, 10 n.6.; ER 27)

[10] In the 1292(b) order, the District Court stated that Respondent had a "substantial likelihood of success on the merits," expressing "serious doubts" about the "correctness" of the coverage ruling, and noting that the coverage ruling was

The Ninth Circuit's Opinion

In reversing summary judgment for Petitioners, the Ninth Circuit, Justices Goodwin, Brunetti and Fernandez presiding, expressly set forth in its unanimous opinion numerous undisputed material facts that supported summary judgment for Respondent.

The Ninth Circuit determined that the complaint failed to identify any conduct by Blattner "that created liability" under the Guren Merritt policy; "nor have the bondholders added additional allegations on summary judgment to bolster their contention." (Pet. App. at 3) The Ninth Circuit also found that Petitioners initially filed suit against Blattner, his then current firm Benesch and others for losses arising out of defaults on the bonds; and that a cause of the default, according to Petitioners, was the failure to obtain life care permits. (*Id.* at 2)

The Ninth Circuit noted that, while Blattner was at Benesch, the OSs prepared by Blattner "neglected to disclose the need for and absence of life care permits." (*Id.* at 2, 4) Moreover, the court found that Petitioners relied upon the OSs issued *by Benesch* in electing to invest in the facilities. (*Id.*) The Ninth Circuit also noted that Blattner prepared, signed and delivered opinion letters on Benesch letterhead attesting to the validity of the bonds and their tax exempt status; the bondholders received copies of those opinion letters when they invested.

The Ninth Circuit then applied the undisputed facts to Respondent's policy, noting that before there could be any coverage, Blattner had to be "legally obligated to pay damages . . . *by reason of* any act, error or omission in rendering professional services while he was at Guren Merritt." (*Id.* at 3) The Ninth Circuit stated the phrase "by

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"contrary" to the common interpretation of the phrase "act, error, and omission" in the insurance industry. (*Id.* at 2-3)

reason of" required some causal nexus between Blattner's activities at Guren Merritt and his *liability* to the bond purchasers. In other words, the Ninth Circuit found that the policy language required that Blattner had to have committed a "liability-creating" act, error or omission while at Guren Merritt in order to trigger coverage. (*Id.*)

Additionally, the Ninth Circuit acknowledged that the Extended Reporting Period Endorsement (Endorsement 7), *by its own terms*, did not expand coverage. The court stated that use of the phrase "arising out of" in Endorsement 7 "did not expand the scope of coverage" and thus, "did not advance the bondholders' argument beyond their primary contention that Blattner acted illegally while at Guren Merritt." (*Id.* at 4-5)

Based on these undisputed facts, the Ninth Circuit applied well-established Arizona insurance law in support of its no coverage opinion. The Ninth Circuit initially held that the District Court committed reversible error in ruling that Blattner's conduct at Guren Merritt constituted an "act, error or omission" sufficient to trigger coverage under the Guren Merritt policy. (*Id.* at 2) Most significantly, the Ninth Circuit ruled that Petitioners presented *"no evidence"* that Blattner engaged in any liability-producing act, error or omission while at Guren Merritt, stating:

> [Petitioners'] deficiency [in failing to allege liability producing conduct of Blattner at Guren Merritt] is fatal to the bondholders' case . . . *Without evidence* Blattner committed some liability creating "act, error or omission" while at Guren Merritt, the bondholder's simply have no claim. (*Id.*)

Moreover, the Ninth Circuit ruled that Petitioners were wrong as a matter of law in attempting to assign liability for Blattner's legal services at one law firm,

which resulted in allegedly faulty documents issued by a second law firm, stating "we cannot equate the liability-creating act of issuing a disclosure statement with the preliminary act of discussing the requirements for such a document." (*Id.* at 4)

Indeed, the Ninth Circuit recognized that this case is *predicated* upon Blattner's failure to disclose (while he was at Benesch) that the project required life care permits. (*Id.* at 4) The Court thus noted that Blattner's "act, error or omission" could not occur until he failed to make the necessary disclosure in the OSs, "an event which occurred after he left [Guren Merritt]." (*Id.*) Accordingly, regardless of Blattner's culpability, the Ninth Circuit held that Guren Merritt cannot, as a matter of law, be held liable "for actions undertaken after Blattner left their employ"; necessarily, the Ninth Circuit held that the bondholders' claim must fail. (*Id.*)

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE STATE LAW ISSUES RAISED BY THE PETITION ARE INSUFFICIENT TO INVOKE THIS COURT'S CERTIORARI JURISDICTION

This Court has long recognized that the ultimate responsibility for determining state law resides not with it, but with the highest courts of the states. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Accordingly, where reasonable arguments have been advanced to support a determination of state law by a federal court of appeals, this Court has found it "wholly unprofitable for [us] to analyze [the state] cases on point." *Estate of Spiegel v. Commissioner of Internal Revenue*, 335 U.S. 701, 708 (1949). It has thus become the policy of this Court to "accept and therefore [not review] the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).

See, Frankfurter, *The Business of the Supreme Court at October term 1933*, 48 Harv. L. Rev. 238, 269-270 (1934) ("[t]he Supreme Court cannot undertake to see that every case in a federal court is decided as a state court would have decided it"). Indeed, this Court has frequently deferred to the views of a court of appeal as being those of an "expert" tribunal concerning the laws of states within its circuit. *See, Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); *Butner v. United States*, 440 U.S. 48, 57-58 (1979).

The Petition should therefore be denied because the Ninth Circuit was entirely correct in ruling that, under Arizona insurance law, there was and can be no coverage under Respondent's professional liability policy. The Ninth Circuit properly recognized that Respondent's policy did not provide coverage unless the insured committed a *liability-producing* act, error or omission during the policy period. (Pet. App. at 3) As noted above, the Ninth Circuit found that, as a matter of law, Guren Merritt had not committed any such act, error or omission – indeed, Guren Merritt was not even sued in the underlying class actions. Thus, since the Ninth Circuit found *"no evidence"* of any liability-producing act, error or omission by Blattner while at Guren Merritt, there simply was no coverage, and Petitioners thus had no claim.

In addition, the Ninth Circuit correctly determined that, as a matter of Arizona law, the so-called "tail" endorsement (Endorsement 7) did not "expand" coverage, except to allow coverage for a claim that was first made after the policy expired. More importantly, the court recognized that Endorsement 7 did not, as Petitioners contended, "expand" coverage for acts, errors or omissions that were *not liability producing*. Rather, as Endorsement 7 expressly provided, the court held that in

order for there to be coverage, the same fundamental requirements of the policy must be met.[11] Petitioners

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[11] Respondent presented the Ninth Circuit with numerous authorities, including leading insurance treatises, stating that the sole purpose and effect of an extended discovery period endorsement, such as Endorsement 7, was only to eliminate the requirement that the claim had to be made during the policy period. *See, New England Ins. Co. v. Sylvia*, 783 F. Supp. 6, 7 (D. N.H. 1991) ("[i]t is noted that the extension relates only to the reporting period and not the coverage period"); *Taub v. First State Ins. Co.*, 44 Cal. App. 4th 811, 818, 52 Cal. Rptr. 2d 1, 5 (Ct. App. 1995) ("[Extended Claims Reporting Period] provision allows [insured] to seek coverage for his claim *assuming that the policy otherwise covers this claim*") (emphasis added); *Langley v. Mut. Fire, Marine & Inland Ins. Co.*, 512 So.2d 752, 753 (Ala. 1987) ("optional extension of coverage . . . would have continued [insured's] coverage . . . for claims based on acts or omissions that occurred during the primary term") (emphasis added); *Employers Reins. Corp. v. Fireman's Fund Ins. Co.*, 95 N.J. 1, 468 A.2d 421, 423 (N.J. 1983) ("[under extended reporting endorsement] coverage is *not* extended to claims made after [the policy period] if the act giving rise to that claim also occurs after that date"); *See also*, 2 Long, *The Law Of Liability Insurance*, § 12B04[4] at p. 12B-85; § 12C.04[2] at p. 12C-60; § 12B04[4] at p. 12B-85 § 12C.04[2] at p. 12C-60 (1989) ("extended reporting provisions merely allow the insured to report claims for a stated period after the expiration date of the policy. They do not cover claims arising out of acts occurring after the expiration date of the policy . . . It should be noted that the purchase of the extended reporting period coverage *does not increase the scope of coverage* under the policy) (emphasis added); *See also* 3 *New York Insurance Law*, § 40.03 [2] at p. 40-7 n.14 (1991) ("extended reporting period coverage does *not* extend the time during which the act, event or occurrence out of which the claim arises must have happened") (emphasis in original); Hanen, *Legal Malpractice Insurance: Exclusions, Selected Coverage and Consumer Issues*, 33 So.Tex.L.Rev. 75, 85 (1992) ("[S]ome legal malpractice insurance policies provide that an insured may purchase an additional period of time in which to report claims under their

failed to refute any of Respondent's legal authorities concerning the purpose and effect of Endorsement 7, and they are unable to demonstrate that the Ninth Circuit's interpretation of Endorsement 7 was incorrect.

Likewise, there is no reason for this Court to review the Ninth Circuit's correct application of indisputable facts and well-established securities law. As a matter of law and undisputed fact, the Guren Merritt firm was not and could not be liable where it was *not* a named defendant in the underlying class actions, had *not* committed any liability-producing act, and had *ceased* to have any involvement with the underlying transactions when the liability-producing acts were committed.

In addition, the sale of bonds to the classes, which is a *sine qua non* to a securities claim, took place more than a half year *after* Guren Merritt had ceased to have any involvement with the projects.[12] It was undeniable that Guren Merritt had no involvement at the time the bonds were sold. Furthermore, the Ninth Circuit properly ruled that because Blattner did not prepare or disseminate any opinion letters to potential bond purchasers while at Guren Merritt, he could not have had any liability as a partner of that firm as a matter of law. As Respondent

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policy . . . These extensions are called extended reporting endorsements or 'tail' coverage").

[12] *See, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 749 (1975) ("one asserting a claim for damages based on the violation of Rule 10(b)5 must either be a purchaser or seller of securities"); *Roberts v. Peat, Marwick, Mitchell & Co.*, 857 F.2d 646, 649-650 (9th Cir.), *cert. denied*, 493 U.S. 1002 (1989) ("to prevail on a cause of action for violation of [Rule 10(b)5], the investors must establish fraud in connection with the purchaser's sale of any security"); *Ohashi v. Bert Indus.*, 536 F.2d 849, 853 (9th Cir.), *cert. denied*, 429 U.S. 1004 (1976) ("no 10(b)-5 liability where alleged fraud was not in connection with the inducement nor concurrently with the exchange [of the security]").

demonstrated below, absent any opinion or representation to the bond purchasers, Blattner had no fiduciary obligation or duty to disclose material information while at Guren Merritt.[13] Thus, the Ninth Circuit correctly held that the opinions of bond counsel upon which the classes relied were issued by Benesch, on Benesch letterhead; Guren Merritt had *nothing* to do with the bond opinions, issued almost half a year after Guren Merritt no longer was involved in the projects.

The Ninth Circuit also properly determined that, as a matter of law, whatever preliminary activities were done by Guren Merritt (while it was bond counsel) were *not* liability-producing and certainly were *not* the basis of the bondholders' claims. (Pet. App. at 4) The best example is that the bondholders complained about a failure to disclose in the prospectus-like Official Statements that certain life care permits had not been obtained and were necessary to make the projects viable. However, as the Ninth Circuit observed, Guren Merritt had nothing to do with the preparation and dissemination of the Official Statements; rather, it was Benesch (and Blattner at

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[13] *See, e.g., Basic, Inc. v. Levinson*, 485 U.S. 224, 239, n.17 (1988) ("[s]ilence, absent a duty to disclose, is not misleading under 10(b)5"); *Chiarella v. United States*, 445 U.S. 222, 229, 231 (1979) (" '[t]he party charged with failing to disclose market information must be under a duty to disclose it' . . . There can be no fraud absent a duty to speak"); *Ackerman v. Schwartz*, 947 F.2d 841 (7th Cir. 1991) (attorney could not evade responsibility to disclose "to the extent he permitted promoters to release his opinion letter to investors' agents"); *Schatz, supra*, 943 F.2d at 494 ("an attorney is rarely liable to any third parties for his or her legal work unless the attorney has prepared a signed 'opinion' letter designed for use by a third party").

Benesch) which approved those Official Statements.[14] Additionally, the Ninth Circuit properly rejected Petitioners' argument that Blattner could have been liable for "aiding and abetting" an alleged securities law violation, merely because he performed preliminary work at Guren Merritt.[15]

Moreover, the Ninth Circuit held that Blattner could not have been liable as a Guren Merritt partner because, while at Guren Merritt, he made no representations to the

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[14] Respondent presented the Ninth Circuit with ample authorities establishing that, since no Official Statement was issued or delivered to any bond purchasers while Blattner was at Guren Merritt, he could not have been liable to the bond purchasers for what he did at Guren Merritt. *See, e.g., Williams v. Sinclair*, 529 F.2d 1383, 1389 (9th Cir.), *cert. denied*, 426 U.S. 936 (1976) ("because investor purchased shares follow[ing] his receipt of the *prospectus*, the transactional nexus between the alleged fraud and the loss" was met). *See also, Schatz v. Rosenberg*, 943 F.2d 485, 492 (4th Cir.), *cert. denied*, 503 U.S. 936 (1992) ("no rule 10(b)5 liability law firm where "[it] did not solicit any purchase of securities or *prepare any solicitation documents*") (emphasis added).

[15] *See, Schatz, supra*, 943 F.2d at 497 ("when a lawyer offers no legal opinions or affirmative misrepresentations . . . and merely acts as a scrivener . . . a lawyer cannot be liable [as an] aider and abettor"); *Camp v. Dema*, 948 F.2d 455, 463 (8th Cir. 1991) (aiding and abetting liability under 10(b)5 rejected for attorneys' "*routine actions* . . . necessary to consummate the sale of stock") (emphasis added). Moreover, the United States Supreme Court has since held that there is *no* private cause of action for "aiding and abetting" a violation of Rule 10(b)-5. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 114 S.Ct. 1439, 1448 (1994) ("[W]e cannot amend the statute to create liability for acts that are not themselves manipulative or deceptive").

bond purchasers upon which they could have or did in fact rely.[16] (Pet. App. at 4)

II. CONTRARY TO WHAT PETITIONERS CONTEND, THERE ARE NO "COMPELLING REASONS" WARRANTING THIS COURT'S REVIEW

A. There Are No Constitutional Or Federal Issues

The Petitioners did not raise, nor have they attempted to raise, any constitutional or federal issues warranting this Court's review. Rather, the Petition improperly seeks this Court's review of the Ninth Circuit's reasoned application of Arizona state law. Since the Petition raises no constitutional or federal law issues, the Court should deny the Petition.

B. There Are No Other "Compelling Reasons"

The Petition should also be denied because there are no other "compelling reasons" warranting this Court's review. The standard factors this Court considers in determining whether "compelling reasons" exist include whether the court of appeal's decision conflicts with another court of appeals on the same matter, or has

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[16] Again, Respondent presented the Ninth Circuit with numerous authorities in support of this fundamental requirement. *See, e.g., Affiliated UTE Citizens v. United States*, 406 U.S. 128, 153-54 (1971); *Kiernan v. Homeland, Inc.*, 611 F.2d 785, 788 (9th Cir. 1980) ("substantial reliance is necessary for recovery in a 10(b)-5 case"); *Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966, 970-71 (2nd Cir. 1987) (securities fraud claim required "reasonable reliance on the representation, causing damage to the plaintiff").

decided an "important federal question" in conflict with a state court of last resort.[17]

Here, there is no conflict between two different courts of appeal (or with a state supreme court) with respect to any of the state law insurance issues resolved by the Ninth Circuit, and Petitioners certainly did not contend there was any. Nor did Petitioners demonstrate any conflict with or deviation from Arizona insurance law. In fact, as explained herein, the Ninth Circuit opinion was demonstrably correct in its interpretation and application of Arizona law.

There is no support in the record or elsewhere for Petitioners' contention that this is a case of "major national importance" to financial offerings. (Pet. at 15) Prior to seeking review by this Court, Petitioners had never stated or intimated that this particular case was of "major national importance." Indeed, it is fair to say that Petitioners always viewed and treated this case as a "garden variety" insurance coverage and bad faith action to be resolved under Arizona law. One will search the record in vain to find anything where Petitioners stated that this case would have significance outside the confines of Arizona. Their belated and self-serving plea of "major national importance" is a transparent effort to convert this case into something which it plainly is not.

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[17] Indeed, this Court's 1980 amendments to its own rules reflect the Court's lack of interest in reviewing diversity cases where, as here, the only issue is an alleged inconsistency (which Respondent disputes) between the court of appeals' decision and the applicable substantive state law. (Omitting the factor that the court of appeals resolved "an important [state] question in a way in conflict with applicable [state] law").

Similarly, Petitioners raise the false cry that this case will "greatly impact" how other professional liability insurers will act. (Pet. at 15) Never before have Petitioners made that assertion. They provide this Court with no specifics or details for such a proposition, since obviously there is none. This case involves a professional liability insurance policy issued more than thirteen years ago with unique policy language. The Ninth Circuit determined there was no coverage based on that language and the particular facts at issue. It is hard to see how this action catapults itself to "national prominence" in *today's* insurance field. Certainly, Petitioners provide no explanation.[18]

III. THE WRIT SHOULD BE DENIED BECAUSE PETITIONERS INAPPROPRIATELY SEEK THIS COURT'S REVIEW OF EVIDENTIARY AND FACTUAL FINDINGS, AS WELL AS MISSTATE THE BASIS OF THE NINTH CIRCUIT'S RULING, THE FACTS AND THE LAW

The Petition should also be denied because Petitioners improperly seek this Court's review of factual and evidentiary findings. As this Court held in *United States v. Johnston*, 268 U.S. 220, 227 (1925), *certiorari* proceedings are not the appropriate vehicle "to review evidence and

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[18] Perhaps the most compelling basis why this Court should reject the purported reasons advanced by Petitioners is that, undeniably, the instant coverage action is really an action by a different professional liability insurer (Old Republic) seeking to make a profit on its having insured Benesch, since it stands to recover 50% of the over $23 million being sought from Respondent. Old Republic has financed this case, pursued it with its own lawyers, has filed the instant Petition through its attorneys and constantly invokes the guise of appearing as the underlying classes.

discuss specific facts." *See also NLRB v. Hendricks County Rural Elec. Corp.*, 454 U.S. 170, 176 (1981) (cross-petition presenting "primarily question of fact . . . does not merit Court review"); *Rudolf v. United States*, 370 U.S. 269 (1962). Indeed, under this Court's standard procedure, "a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." (SC Rule 10(a)).

Moreover, the Petition misstates the fundamental basis of the Ninth Circuit's opinion, the relevant facts and the law, and therefore should be denied.

A. The Petition Misstates The Basis Of The Ninth Circuit's Opinion

Petitioners wrongly claim that the Ninth Circuit's interpretation of the policy was contrary to the "very purpose of the tail endorsement." (Pet. at 2) According to Petitioners, Endorsement 7 had the effect of expanding coverage beyond that afforded by the policies' basic insuring agreement, given that Endorsement 7 uses the phrase "arising out of", while the insuring agreement uses "by reason of." (Pet. at 17-18)

In rejecting Petitioners' premise of coverage, the Ninth Circuit correctly held that, under Arizona law, the well-established meaning, purpose and effect of Endorsement 7 required that Blattner's liability to the bondholders had to be "by reason of" (not merely "arise out of") a liability-producing act, error or omission while at Guren Merritt. (Pet. App. at 3, 5) Petitioners also mischaracterize how the Ninth Circuit arrived at its opinion by claiming that the panel "did not even attempt" to determine whether the language in the tail endorsement was "ambiguous" under Arizona law. (Pet. at 25-30) In fact, the Ninth Circuit expressly rejected this argument,

noting that "Endorsement 7's *plain language clearly does not expand the scope of coverage beyond the original policy.*"[19]

B. The Petition Misstates The Facts

Petitioners also misstate the facts by contending that "the scheme to defraud investors was hatched while Blattner was at Guren Merritt." (Pet. at 8) As properly recognized by the Ninth Circuit, however, Petitioners presented "no evidence" of any liability-creating conduct of Blattner while at Guren Merritt.[20] (Pet. App. at 4)

Petitioners also grossly mischaracterize the life care permit issue, stating that Blattner "had knowledge" of the life care permit "requirement" while he was at Guren Merritt. (Pet. at 9) Substantial evidence in the record and Respondent's main brief below demonstrated that the issue of life care permits had just surfaced, and was undetermined at the time Blattner left Guren Merritt for Benesch. More importantly, however, the Ninth Circuit recognized that the "life care" permit issue was only relevant because the OSs – *disseminated to the bond purchasers while Blattner was at Benesch* – failed to disclose the alleged requirement for life care permits, and the investors relied on those omissions. (Pet. App. at 4) (See

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[19] Petitioners further misstate that the Ninth Circuit "ignored" certain extrinsic evidence purporting to show that CIGNA "recognized" there was coverage. (Pet. at 27-30) The Ninth Circuit did not "ignore" such extrinsic evidence; the court was presented with ample, unrefuted authorities by Respondent confirming that such "evidence" was both inadmissible and irrelevant.

[20] To the extent Petitioners claim there was a "scheme to defraud" while Blattner was at Guren Merritt, that claim is frivolous, since as a matter of law and public policy, there can be no insurance for such conduct. *See, e.g., Standard Fire Ins. Co. v. Peoples Church of Fresno*, 985 F.2d 446, 448-51 (9th Cir. 1993).

attached Appendix) Thus, in determining that the life care issue was wholly irrelevant for purposes of whether Blattner's Guren Merritt conduct was liability-producing, the Ninth Circuit stated:

> [Petitioners] do not contend that Blattner issued the Official Statements which failed to include the life care requirements until after he left Guren Merritt . . . Blattner's act, error, or omission could not occur until he failed to make the necessary disclosure in the Official Statements, an event which occurred after he left Guren Merritt. (Pet. App. at 3-4)

Petitioners also wrongly contend that the Ninth Circuit "was required, yet failed, to engage in an analysis of case law on insurance contract construction." (Pet. at 25-26) Petitioners have no evidence to support this claim. Indeed, as explained above, the Ninth Circuit expressly analyzed the plain meaning of the policy language, giving Endorsement 7 its well-established meaning and effect. Respondent also presented the Ninth Circuit with numerous authorities that there was no "conflict" or "inconsistency" between Endorsement 7 and the policy, all of which support the Ninth Circuit's construction of the policy.

C. The Petition Misstates The Law

With no authorities to support their position, as the Ninth Circuit noted, Petitioners nonetheless insist that the Ninth Circuit "nullified" the very purpose of Endorsement 7, because the language of the tail (i.e., "arising out of") controls over the language of the insuring agreement ("by reason of"). As noted above (see fn. 11, *supra*), ample case law and other authorities, as well as Petitioners' own concessions at oral argument, refute

Petitioners' interpretation of Endorsement 7 before this Court.[21]

In addition, Petitioners misstate the law by suggesting that Blattner could have been liable to the bondholders for what he did at Guren Merritt. (Pet. at 19-24) Petitioners principally rely on a single case, *Cronin v. Midwestern Oklahoma Develop. Authority*, 619 F.2d 856 (10th Cir. 1980), in asserting that Blattner engaged in "liability creating" acts at Guren Merritt. As Respondent asserted below, however, *Cronin* is distinguishable because, in that securities fraud case, the court merely held that summary judgment in favor of an attorney was prematurely granted; there was no determination of *liability* against the attorney. As Respondent demonstrated below, numerous decisions from this Court, the Ninth Circuit and elsewhere confirm that, *as a matter of law*, Blattner could *not* have been liable to the bond purchasers because of anything he did at Guren Merritt. (*See* attached Appendix; discussion Point I, *supra*, at pp. 16-22)

IV. THE NINTH CIRCUIT'S RULING PROPERLY VOIDED AN UNJUST WINDFALL FOR PETITIONERS

The Ninth Circuit properly reversed the District Court's coverage ruling, which would have resulted in a windfall for Petitioners and Old Republic. As part of the March 20, 1991 settlement, the settling parties and Old Republic gave Respondent 5 days to contribute its $5

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[21] Indeed, Petitioners' counsel conceded at oral argument before the Ninth Circuit panel that Petitioners' position on why coverage exists was *not* dependant upon Endorsement 7 purportedly expanding the scope of coverage. (*See March 13, 1997 Transcript of Oral Argument to Ninth Circuit*, JJ. Goodwin, Brunetti and Fernandez presiding, at pp. 29-30, 36).

million limits, otherwise the settlement would be executed without Respondent and Respondent would be sued for coverage for the stipulated $23 million judgments, bad faith, and punitive damages. However, at that time, the settlement agreement already had provided, whether Respondent agreed to pay or not, that Blattner was *not* exposed to any liability.

If Respondent did not pay, Petitioners and Old Republic would try to hold Respondent liable. Knowing that Blattner would not be exposed to any personal liability, Respondent adhered to its no coverage position. Through this intended "set up," Petitioners and Old Republic sought an undeserved, potential $23 million windfall from Respondent, which the Ninth Circuit properly reversed.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests the Court to deny the instant Petition for grant of a writ of *certiorari*.

Dated: September 25, 1997

Respectfully submitted,

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APPENDIX

Guren Merritt | **Mid-March 1984** | **Benesch Friedlander**

1984	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
IDA Approval	Feb. 1 Applications submitted Feb. 8 Approval for Chandler Feb. 16 Preliminary IDA approval granted for Sun Mesa				June 6 Blattner requests amended resolution from Chandler IDA June 12 Amended Sun Mesa application filed June 15 Amended IDA resolution re: Chandler	July 11 Amended Chandler IDA Application filed July 25 Final IDA resolution for Chandler			Oct. 11 Final IDA resolution for Sun Mesa		
Tax Exempt Status		Mar. 16 501(c)3 applications filed		May 22 Tax exemption granted re: Sun Mesa							
Life Care Applications		Mar. 6 Issue first surfaces	Apr. 10 Blattner tells Clark and Liberatore to investigate "necessity of Life Care permits" Apr. 26 Liberatore asks Drummond to apply for Life Care permits		June 28 Blattner asks Clark about state of Life Care permits				Oct. 12 Chandler application filed by Drummond	Nov. 28 Deficiency letter from Arizona DOI	
Preliminary Official Statements (POS)		Mar. 24 Furby begins drafting POS Mar. 28 Due diligence meeting: initial draft of POS discussed		May 17-18 Due diligence meeting: Discussion of next draft of POS	June 1 POS Chandler	July 1 POS Chandler July 25 Final printed POS Chandler	Aug. 1 Draft POS Sun Mesa		Oct. 9 Final printed POS Sun Mesa		
Official Statements Disseminated							Aug. 16 Chandler Official Statement			Nov. 30 Sun Mesa Official Statement	
Issuance of Bond Opinions							Aug. 30 Blattner's Bond Opinion for Chandler			Nov. 30 Blattner's Bond Opinion for Sun Mesa	
Sale of Bonds to Investors							Aug. 30 Chandler bonds sold			Nov. 30 Sun Mesa bonds issued	

1985 Bonds go into default